No. 42803-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Dennis McCarthy,

Appellant.

Kitsap County Superior Court Cause No. 10-1-00940-8

The Honorable Judge Theodore Spearman

Appellant's Opening Brief

Corrected Copy

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38. The trial court violated Mr. McCarthy's state and federal constitutional right to have the jury determine every fact which increases the penalty for a crime beyond a reasonable doubt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge answered a jury question and provided them with a measuring tape and masking tape without consultation with counsel or any hearing on the record. Did the trial judge violate the constitutional requirement that criminal trials be open and public by answering the question and providing the tools without any record of it in open court, without first conducting any portion of a Bone-Club analysis?

2. An accused person has the constitutional right to be present at all critical stages of trial. In this case, the court determined the answer to a jury question and provided them with tools without conferring with counsel or allowing Mr. McCarthy to respond. Did the trial judge violate Mr. McCarthy's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?

3. An accused person has the constitutional right to confront adverse witnesses. Here, the trial court restricted cross-examination regarding Carey's pre-existing bias against Mr. McCarthy. Did the restriction on cross-examination violate Mr. McCarthy's confrontation rights under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

4. An accused person has a constitutional right to present relevant admissible evidence. Here, the trial judge refused to admit relevant and admissible evidence, including expert testimony addressing the domestic violence relationship between Mr. McCarthy and Carey. Did the trial judge violate Mr. McCarthy's Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?

5. CrR 3.3 requires the court to bring an in-custody defendant to trial within 60 days, unless the time for trial is reset. Here, the court erroneously entered an order disqualifying the entire Kitsap County prosecutor's staff, and thereby reset Mr. McCarthy's speedy trial expiration date. Did the unwarranted delay of Mr. McCarthy's trial violate his right to a speedy trial under CrR 3.3?

6. Dismissal is required where government mismanagement delays a trial beyond an accused person's speedy trial expiration date. Here, the government discovered and/or created a purported conflict of interest eight months after Mr. McCarthy's arraignment, resulting in disqualification and continuance of the trial date. Did the prosecution's mismanagement violate Mr. McCarthy's right to a speedy trial?

7. Evidence of an accused person's prior misconduct may not be admitted in a criminal trial if the probative value is substantially outweighed by the danger of unfair prejudice. Here, the trial judge admitted evidence of Mr. McCarthy's prior misconduct without properly balancing the probative value and prejudicial effect. Did the trial court err by admitting irrelevant and unduly prejudicial evidence of criminal propensity without balancing relevant factors on the record?

8. A criminal conviction may not be based on propensity evidence. In this case, Mr. McCarthy's assault convictions were based in part on evidence of prior assaultive behavior. Were Mr. McCarthy's convictions based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process?

9. Hearsay evidence is generally inadmissible. Here, the trial judge overruled Mr. McCarthy's hearsay objections on numerous occasions, and admitted out-of-court statements as substantive evidence. Did the admission of this evidence violate the rule against hearsay?

10. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to object to inadmissible hearsay and failed to propose an instruction limiting the jury's consideration of certain evidence. Was Mr. McCarthy denied his

Sixth and Fourteenth Amendment right to the effective assistance of counsel?

11. An accused person must be granted a new trial when a trial irregularity deprives the defendant of a fair trial. Here, Carey testified that Mr. McCarthy had poisoned her and referenced "other things that I'm not allowed to talk about." Did this trial irregularity violate Mr. McCarthy's due process right to a fair trial?

12. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose against the same victim. In this case, Mr. McCarthy was convicted of twice assaulting Carey at the same time and place, with the same overall criminal purpose. Did the trial judge abuse his discretion by scoring Counts I and II separately?

13. An accused person has a right to have the jury determine every fact which increases the penalty for a crime. In this case, the court applied a preponderance standard and found facts that increased Mr. McCarthy's sentence. Did imposition of the enhanced sentence violate Mr. McCarthy's right to a jury trial and to due process under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. STATEMENT OF FACTS

Dennis McCarthy and Tammy Carey grew up together in New York. RP[1] 184-186, 1001. Their families were friends, and Mr. McCarthy and Ms. Carey's brother were quite close. RP 1013-1014. As adults, both Mr. McCarthy and Ms. Carey joined the military. They lost touch, but

[1] The trial transcript is sequentially numbered, and will be cited as RP. All other citations to the Verbatim Report of Proceedings include the date cited.

reconnected in 2004. Mr. McCarthy divorced, and they eventually started a relationship. RP 186-190, 1002, 1018, 1020, 1022.

Mr. McCarthy was a deputy sheriff for Kitsap County for several years, and then he worked at the Port Orchard Police Department. RP 1004-1007. By 2008, he had attained the rank of Sergeant. RP 191, 1007. Ms. Carey moved in with Mr. McCarthy in August of 2008. RP 191, 1084.

Mr. McCarthy and Ms. Carey's relationship was tumultuous: they planned to separate, they planned to marry, they both called law enforcement with allegations that they later recanted, and they both believed themselves to be victimized and controlled by the other person. RP 191-194, 197-198, 238, 346, 402-403, 414-415, 1030-1035, 1067-1071, 1077-1080.

On November 2, 2008, the couple argued. RP 1038. Mr. McCarthy had been drinking, and at one point they argued while he held a lit propane torch (usually used to light the fire). RP 767, 771, 1031-1041. He then went to the garage, set fire to some of her property, and fell asleep. They both woke up to a fire still burning in the garage. RP 200, 209-211, 1042-1044. Carey called 911 and Mr. McCarthy was arrested and charged with reckless burning. RP 211, 788, 1044, 1055.

The court issued a No Contact Order.[2] RP 215, 789. Mr. McCarthy accepted a diversion agreement which included treatment. RP 227-228, 789, 875, 1059. One consequence of this charge was that Mr. McCarthy lost his job at the police department. He later obtained employment as an officer for the Department of Defense at a nearby naval base. RP 237, 1008, 1011.

In February of 2009, Mr. McCarthy and Ms. Carey were in the parking lot of a local Fred Meyer. Ms. Carey threw a cigarette out her window, and a pregnant woman confronted her. RP 757-758. According to several witnesses (including Mr. McCarthy), Ms. Carey got out of the car, broke the necklace off the woman's neck, and stuffed mail down her shirt. RP 758. Police were called, but the victim later dropped the charges. RP 758.

On May 2, 2010, Ms. Carey planned to move out of Mr. McCarthy's home. RP 247, 429, 803, 1080. Early that morning, as Mr. McCarthy showered (in preparation for leaving for work), Carey readied her move in her own room. RP 271-272, 803, 1087.

Accounts vary on what happened next. According to Carey, Mr. McCarthy came into her room, put a gun to her head, fought with her, and

[2] This order was violated multiple times, as each party called the other with some frequency. RP 223, 226, 1054-1055. Mr. McCarthy was later charged with several counts of Violation of a No Contact Order, to which he pled guilty. RP 9-12.

pushed her out the window. RP 277-291. By contrast, Mr. McCarthy said that he heard a noise while in the bathroom and came out to find that Ms. Carey had fallen out of the window. RP 746, 803, 1087-1089.

Mr. McCarthy called 911, twice, and expressed his frustration at how long it took for aid to respond. RP 143, 1090, 1094. Because he'd been verbally aggressive to the operator, police accompanied the aid crew to ensure security (but not to conduct an investigation). RP 140-144, 154. Upon arrival, the first officers on the scene saw Ms. Carey lying on the deck with Mr. McCarthy attending her. RP 144.

The paramedics were told that Ms. Carey had been hanging curtains and fell out the second story window. RP 80, 101, 472. They saw her lying on the deck, clearly in pain and very tearful. RP 80-81, 108. While receiving assistance on the deck, Ms. Carey stated that she had been hanging curtains and fell. RP 83, 93, 103, 475.

In the ambulance, Ms. Carey stated that she feared police. RP 87. She said she did not want Mr. McCarthy with her at the hospital. Many who saw her throughout the day (including hospital staff) gave her information about domestic violence. RP 88, 111, 459-460, 567, 598. She also said that her dog had been poisoned recently. RP 721.

At her request, arrangements were made for Mr. McCarthy to be excluded from her room. RP 1098. Soon, however, Ms. Carey called Mr.

McCarthy, asked him to come and visit her, and had the restrictions lifted. RP 302, 305, 1099.

She was treated at the local hospital for a few weeks, sent to Harborview Medical Center for additional surgeries, and then released to rehabilitative care. RP 302-303, 310, 317. After she was discharged from the hospital, she went with friends to get the last of her property from Mr. McCarthy's home. RP 319-322, 645-646. The rehabilitation facility asked her to leave, and she rented a hotel room. RP 323-324.

At some point, while living in that hotel room, Ms. Carey felt suicidal and asked Mr. McCarthy to come and see her. RP 325, 1106. He did, and helped her get food, medication, and care for her dog. She then decided against self-harm. RP 325-326, 373, 807, 1107-1109.

More than three months after the fall, Ms. Carey contacted police, asserting that Mr. McCarthy had pushed her. RP 796-799.

II. PRIOR PROCEEDINGS, TRIAL TESTIMONY, VERDICT AND SENTENCING.

A. Charges

Mr. McCarthy was charged with one count of first-degree assault, one count of second-degree assault, and numerous no-contact order violations (to which he pled guilty). CP 57-70; RP 9-12. The prosecution also alleged that he was armed with a firearm during both assaults, and that the assaults constituted domestic violence. CP 57-59.

B. Speedy trial

Discovery continued until June of 2011, in part because the county prosecutor assigned to the case planned to use an expert on domestic violence. RP (5/5/11) 13; RP (5/25/11) 2; RP (6/29/11) 24. Trial was set for June 6, 2011, and multiple witnesses, including experts, were scheduled to appear. On more than one occasion, Mr. McCarthy (who was in custody) resisted continuing the trial. RP (4/13/11) 6; RP (5/5/11) 18; RP (5/25/11) 5-6; RP 1000. However, by May 25th, the defense had still not received the report from the state's expert; accordingly, the case was delayed further. RP (5/25/11) 2-12.

A new trial date was set for August 23, 2011. RP (5/25/11) 8-9. On August 12, 2011, the county prosecutor stated that she had a conflict of interest and the office needed to withdraw:

> MS. MONTGOMERY: We believe that we have a conflict that precludes the Kitsap County Prosecutor's Office from trying this case, at this point. This conflict has arisen out of recent interviews that we've done that makes both Ms. Schnepf and I and several other prosecutors from our office witnesses in this case.
> THE COURT: Ms. Schnepf, do you agree?
> MS. SCHNEPF: I agree, Your Honor. I don't believe we can ethically proceed on this case, at this point.
> MS. MONTGOMERY: We do this with, obviously, great deliberation and with -- talking to our elected official, and the decision was made today.
> THE COURT: Is another county going to be approached?
> MS. MONTGOMERY: We don't believe a county is appropriate, Your Honor. We think that there may be other conflicts with other

counties. And Mr. Hauge is contacting the Attorney General's Office.
THE COURT: Very well.
RP (8/12/11) 11-12.

The court sought additional details on the conflict, and the state responded:

MS. MONTGOMERY: I can indicate to the Court that we have recently been interviewing law enforcement witnesses. And based on statements that have been made about substantive issues, in this case, and impeachment issues, in this case, that the State's prosecutors have now become impeachment witnesses and substantive witnesses. The problem with this case, Your Honor, is that the relationship between Mr. McCarthy and Ms. Carey went on for some time. There were multiple DV issues. There is so much 404(b) type evidence, in this case, that the Defense and the State basically have agreed that most of it just comes in. Unfortunately, that implicates law enforcement officials, from Port Orchard to Kitsap County to the jail, and also implicates our office. And as you know, as a former trial lawyer, when you prepare for a case, certain witness interviews happen. Some happen early on. Some happen towards the end of trial. When we got to law enforcement interviews, which we diligently tried to set up, we came to the conclusion that the information that we received would make us be potential witnesses. There's nothing we can do about that.
THE COURT: That's what I needed to know. I needed to know that. Ms. Schnepf, do you agree?
MS. SCHNEPF: I do, Your Honor.
THE COURT: It reminds me of that -- the old expression of somethings that just happens. It still means the Defendant is going to suffer the consequences. However, in the instrumentation of justice and the carrying out of justice, sometimes this happens. But the Court can make every effort it can to speed this along so that if it's possible to continue -- to go with the trial in August, as set, it will. If it can't, then that will be a separate issue that the Court will entertain. I'm going to allow you to withdraw from the case, based on what I've heard.
RP (8/12/11) 15-16.

Without further inquiry, the court entered an order disqualifying the entire Kitsap County Prosecuting Attorney's office. RP (8/12/11) 16; CP 1. An assistant Attorney General took over the case, and trial was continued. RP (8/18/11) 30-50. All of this occurred over defense objection. RP (8/12/11) 14; RP (8/18/11) 34-41, 47.

C. Pretrial evidentiary rulings

Over defense objection, the prosecutor sought to admit all of Mr. McCarthy's prior bad acts. RP (10/14/11) 31; CP 2-8; Memorandum State's Re: Prior Bad Acts, Supp. CP. In addition to the incident with the propane torch, Ms. Carey alleged that Mr. McCarthy had assaulted her on five occasions. RP (10/14/11) 34; RP 29-31. The prosecutor argued that the incidents were relevant to explain Ms. Carey's delay in reporting and to establish the reasonableness of her fear (for the second-degree assault charge). RP 29-31, 33-36. The court admitted all of the evidence.[3] RP 37; CP 246.

The prosecutor also sought to exclude Ms. Carey's prior bad acts, including any reference to the incident at Fred Meyer and her assaults against Mr. McCarthy. RP (10/14/11) 20-21; Memorandum State's Re:

[3] The state later withdrew one and did not present it to the jury: Carey's allegation that Mr. McCarthy had raped her. RP 35.

Prior Bad Acts, Supp. CP; CP 2-8. The defense argued that the evidence was necessary to provide a complete picture of the relationship, in light of the evidence the prosecution planned to introduce. RP (10/14/11) 23-29; RP 32-33.

The court granted the prosecution's motion, and ruled that Carey's prior acts were not admissible. RP (10/14/11) 37; CP 243.

Mr. McCarthy wished to present expert testimony on domestic violence through Dr. Daniel Rybicki, to help explain the couple's abusive relationship.[4] Counsel argued that the dynamics of the relationship were beyond the understanding of the average juror. RP 23-25. The court denied counsel's request and excluded the evidence. RP 28-29.

Throughout the trial, Mr. McCarthy sought reconsideration of these pretrial rulings. The trial court refused to allow the expert testimony, or to permit Mr. McCarthy to introduce evidence of Ms. Carey's prior assaults. RP 383-384, 544-552, 954-959, 1185-1195.

D. Trial testimony

Carey testified that Mr. McCarthy began assaulting her in September of 2008. RP 193. She said that he pushed her and hit her multiple times,

[4] The defense had originally retained Dr. Rybicki to counter anticipated testimony from the state's expert; however, after the county prosecutor was disqualified, the Assistant Attorney General assigned to the case decided not to introduce domestic violence expert testimony. RP (10/14/11) 34.

that he restrained her with his hands or with handcuffs, and that he locked her in a closet for long periods of time. RP 195-196. She outlined the November 2, 2008 argument, and said that in addition to burning her property in the garage, Mr. McCarthy punched a hole in the wall, broke photos, bashed her head into a piece of exercise equipment, put the lit blowtorch to her face, and burned the bedroom door. RP 201-204, 206.

During her testimony, she also said that Mr. McCarthy always found a way to make her sick or "other things that I'm not allowed to talk about." RP 248. Mr. McCarthy's objection was sustained, and the court ordered the remark stricken. RP 248. After the jury was excused, Mr. McCarthy asked the court to declare a mistrial, arguing that the prejudice occasioned by Ms. Carey's remark could not be ameliorated through instructions. The court denied the motion. RP 258-265.

Four witnesses were permitted to testify about what Carey said of the incident, without objection from defense. Carey's domestic violence advocate (Debbie Brockman) relayed to the jury Carey's allegations about Mr. McCarthy.[5] RP 419-467. These included Carey's assertions that Mr. McCarthy put a gun to her head, struggled with her, and then pushed her out of the window. RP 436-437. Defense counsel did not object to

[5] She also explained that Ms. Carey distrusted police and was hesitant to call authorities on Mr. McCarthy because she came from a family of police officers. RP 422-423, 439.

Brockman's testimony. Nor did defense counsel object when the hospital social worker repeated Ms. Carey's allegations about how she was hurt. RP 563, 593, 606-607. Defense counsel also failed to object when two of Carey's friends repeated the allegations. RP 638-639, 667-668.

Counsel did object on three occasions when the prosecutor sought to introduce hearsay versions of Carey's allegations. RP 516-517, 536; 897-898. Each time, the objections were overruled. RP 516-517, 536; 897-898.

Both sides offered expert testimony regarding how Carey's injuries were inflicted. The prosecution offered the opinion of Dr. Tencer, who opined that Carey did not fall (assuming her body was five feet or more from the house wall). RP 903-929, 933, 937. Mr. McCarthy introduced the testimony of Kay Sweeney, who explained that the most likely scenario—given Carey's injuries and the other information known—was that she fell, and was not pushed. RP 960-980.[6]

E. Jury deliberations and verdict

After the case went to the jury, the parties were told that a verdict had been reached. RP 1324. However, before bringing the jury into the courtroom, the trial judge made an announcement:

[6] Witnesses gave conflicting accounts of Carey's distance from the house. Witnesses described her position as between three and ten feet from the edge of the house. A number of these witnesses were adamant that she was not as far from the house as other witnesses testified. RP 81, 105, 116, 145, 474, 478, 485, 716.

> The parties need to know, before the jury is brought in, they had one question that I thought I could answer sua sponte or on my own. They asked for a measuring tape and some masking tape, and I told the bailiff to deliver that to the jury room.
> RP 1324.

In response to Mr. McCarthy's objection, the court commented: "It seemed innocuous to me." RP 1324.

The jury found Mr. McCarthy guilty on all charges, and answered "yes" on all of the special verdicts. CP 99-105.

F. Sentencing

At sentencing, the parties disputed whether the two assault convictions scored as the same criminal conduct. RP (11/10/11) 2-7. The court found (by a preponderance of the evidence) that the two assaults did not meet the definition of "same criminal conduct," scored them separately, and imposed a total of 267 months. RP (11/10/11) 7, 39. Mr. McCarthy timely appealed. CP 261.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. MCCARTHY'S RIGHT TO AN OPEN AND PUBLIC TRIAL, HIS RIGHT TO BE PRESENT AT TRIAL, AND HIS RIGHT TO A DECISION BASED SOLELY ON THE EVIDENCE.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether

a trial court procedure violates the right to a public trial is a question of law reviewed de novo. State v. Njonge, 161 Wash.App. 568, ___, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. Id, at ___.

B. The trial court violated both Mr. McCarthy's and the public's right to an open and public trial by responding to a jury request behind closed doors.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; State v. Bone-Club, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); Presley v. Georgia, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. Bone-Club, at 258-259. Failure to conduct the proper analysis requires reversal, regardless of whether or not the accused person made a contemporaneous objection. Bone-Club, at 261-262, 257.[7] In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. Presley, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person "is fairly dealt with and not unjustly condemned." State v. Momah, 167 Wash.2d 140,

148, 217 P.3d 321 (2009). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." Id. The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. State v. Strode, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); State v. Duckett, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly de minimis, for hearings that address only legal matters, or for proceedings are merely "ministerial." See, e.g., Strode, at 230.[8,9]

In this case, the trial judge responded to a jury request by providing jurors with a tape measure and masking tape. RP 1324. The decision to supply these items was made in camera without the required analysis and findings. It therefore violated Mr. McCarthy's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV;

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[7] See also State v. Strode, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); State v. Brightman, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

[8] "This court, however, 'has never found a public trial right violation to be [trivial or] de minimis'" (quoting State v. Easterling, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

[9] The Court of Appeals has held that the public trial right only extends to evidentiary hearings. See, e.g., State v. Sublett, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. Momah, at 148; Strode, at 230.

Wash. Const. Article I, Sections 10 and 22; Bone-Club, supra. It also violated the public's right to an open trial. Id. Accordingly, the assault convictions must be reversed and the case remanded for a new trial. Id.

C. The trial court violated Mr. McCarthy's right to counsel and his right to be present by providing the jury with a tape measure and masking tape without consulting either party.

An accused person has a constitutional right to counsel at all critical steps of the adjudication process. State v. Ulestad, 127 Wash. App. 209, 214, 111 P.3d 276 (2005). Limitations on this right must be closely monitored. Id. A stage is critical if it presents a possibility of prejudice to the defendant. State v. Harell, 80 Wash. App. 802, 804, 911 P.2d 1034 (1996).

Similarly, a criminal defendant has a constitutional right to be present at all critical stages. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); State v. Pruitt, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." Id. Accordingly, "the constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its

outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" United States v. Tureseo, 566 F.3d 77, 83 (2d Cir. 2009) (quoting Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

Here, the trial court responded to a jury request without consulting counsel, and in Mr. McCarthy's absence. By providing jurors with a tape measure and masking tape, the trial court effectively presented the jury with additional evidence, without input from the accused person or his lawyer. This violated his right to the assistance of counsel and his right to be present. Ulestad, at 214; Gagnon, at 526; Tureseo, at 83. His assault convictions must be reversed and his case remanded for a new trial. Id.

D. The trial court violated Mr. McCarthy's right to a verdict free from juror misconduct and based solely on the evidence admitted at trial.

In conducting their deliberations, jurors have a duty to consider only the evidence presented in open court. United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991). Evidence acquired through out-of-court experiments is considered extrinsic evidence. Id.

An accused person is entitled to a new trial if there is a reasonable possibility that extrinsic evidence could have affected the verdict; such a possibility exists if the extrinsic evidence may have affected the reasoning of even one juror. Id. The test is equivalent to the harmless error analysis

applicable to constitutional errors. Id. Thus, the proper inquiry is whether the prosecution can show beyond a reasonable doubt that the extrinsic evidence did not affect the verdict. Id.

In this case, the judge provided jurors with a tape measure and masking tape. These materials constituted extrinsic evidence. Id. Presumably, jurors used these materials—which were not admitted at trial—to perform experiments relating to the dimensions of the window and the distance Carey fell. Any such experiments also constitute extrinsic evidence. Id.

Because the court provided these items to the jury without notifying the attorneys in advance, defense counsel had no opportunity to object or propose instructions limiting their use. RP 1324. The error is presumed prejudicial.

Mr. McCarthy's right to a decision free from misconduct and based solely on the evidence admitted at trial was violated by the trial judge's decision to provide jurors with a tape measure and masking tape (without input from counsel, and without instructions on the permissible use of these materials). Navarro-Garcia, at 821.

II. THE TRIAL COURT VIOLATED MR. MCCARTHY'S RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO CONFRONT WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Standard of Review

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,[10] this discretion is subject to the requirements of the constitution. A court necessarily abuses its discretion by denying an accused person her or his constitutional rights. State v. Iniguez, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009) ; see also United States v. Lankford, 955 F.2d 1545, 1548 (11th Cir. 1992). Accordingly, where the appellant makes a constitutional argument regarding the exclusion of certain evidence, review is de novo. Iniguez, at 280-281[11].

B. The trial court violated Mr. McCarthy's right to confrontation by excluding evidence of Carey's bias.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses.

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[10] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or an erroneous view of the law. State v. Hudson, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

[11] see also United States v. Martin, 618 F.3d 705, 727 (7th Cir. 2010) (Where a "limitation of cross-examination directly implicates the values protected by the Confrontation Clause of the Sixth Amendment," review is de novo).

State v. Foster, 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The purpose of cross-examination

> ...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

Where credibility is at issue, the defense must have wide latitude. State v. York, 28 Wash.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence "must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." Darden, at 621.

The threshold to admit relevant evidence is so low that even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. Darden, at 621; see also ER 401, ER 402. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. State v. Jones, 168 Wash.2d 713, 721, 230 P.3d 576 (2010) (Jones I) (citing State v. Hudlow, 99 Wash.2d 1, 16, 659 P.2d 514 (1983).

An accused person "has a constitutional right to impeach a prosecution witness with bias evidence." State v. Spencer, 111 Wash.App. 401, 408, 45 P.3d 209 (2002). Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. Martin, at 727. Evidence demonstrating witness bias is relevant and admissible. United States v. Abel, 469 U.S. 45, 50-51, 55-56, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (interpreting Federal Rules of Evidence). Evidence that a witness had previously assaulted and/or abused a litigant necessarily shows that witness's bias against the litigant. See, e.g., Lloyd v. State, 909 So. 2d 580 (Fla. Dist. Ct. App. 2005) (evidence that witness had previously assaulted defendant was relevant to show bias against defendant).

Here, Mr. McCarthy possessed information establishing that Carey had assaulted and abused him. This evidence should have been admissible to show Carey's bias; however, the trial court excluded all such evidence. RP (10/14/11) 37. This was error: the evidence was relevant to show bias; by excluding it, the trial court deprived Mr. McCarthy of his state and federal right to confrontation. Spencer, at 408; Martin, at 727. Accordingly, his assault convictions must be reversed and the case remanded for a new trial, with instructions to allow cross-examination—and, if necessary, extrinsic evidence—regarding Carey's prior assaults against and abuse of Mr. McCarthy. Id.

C. The trial court violated Mr. McCarthy's constitutional right to present his defense.

A state may not "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

An accused person must be allowed to present his version of the facts so that the jury may decide "where the truth lies." State v. Maupin, 128 Wash.2d 918, 924, 913 P.2d 808 (1996) (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has described this right as "a fundamental element of due process of law." Washington v. Texas, at 19.

The right to present a defense includes the right to introduce relevant and admissible evidence. State v. Lord, 161 Wash.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. State v. Elliott, 121 Wash.App. 404, 410, 88 P.3d 435 (2004). An appellate court will not "tolerate prejudicial constitutional error and will reverse unless

the error was harmless beyond a reasonable doubt." State v. Fisher, 165 Wash.2d 727, 755, 202 P.3d 937 (2009).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Unless otherwise limited, all relevant evidence is admissible. ER 402. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. Salas v. Hi-Tech Erectors, 168 Wash.2d 664, 669, 230 P.3d 583 (2010).

14. The trial court erroneously excluded evidence that Carey had assaulted and abused Mr. McCarthy.

Where one party introduces evidence on a topic, it opens the door "'to rebuttal with evidence that would otherwise be inadmissible...[and] to evidence offered to explain, clarify, or contradict the party's evidence.'" State v. Jones, 144 Wash. App. 284, 298, 183 P.3d 307 (2008) (Jones II) (quoting Karl B. Tegland, 5 Washington Practice: Evidence Law and Practice § 103.14, at 66–67 (5th ed.2007)). As the Supreme Court has noted,

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a

> point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Gefeller, 76 Wash. 2d 449, 455, 458 P.2d 17 (1969).[12]

Where the prosecution introduces evidence of prior abuse, the accused person must be permitted to complete the picture with evidence showing that the victim also engaged in violence or abusive behavior. Jones II, at 298; Gefeller, at 455. Otherwise, the jury is left with a misleading image of the couple's interactions. Id.

In this case, the prosecution was allowed to paint a one-sided portrait of Mr. McCarthy's relationship with Carey. Mr. McCarthy was portrayed as the abuser and Carey as the victim; in fact, the relationship was more complex, with both partners engaging in abusive and manipulative conduct. RP 191-194, 197-198, 238, 346, 402-403, 414-415, 1030-1035, 1067-1071, 1077-1080. By admitting evidence of Mr. McCarthy's prior misconduct while excluding Carey's abusive behavior, the court gave the jury an incomplete picture of the relationship.

Furthermore, evidence of at least some of Carey's abusive behavior should have been admitted under ER 106 (the rule of completeness) or the res gestae exception to ER 404(b), to complete the picture of each

[12] See also, e.g., State v. Hartzell, 156 Wash. App. 918, 926, 237 P.3d 928 (2010) (defendant "opened the door to hearsay when he himself elicited an incomplete and misleading hearsay version of events from one of the detectives.")

criminal incident in which she alleged Mr. McCarthy harmed her in some way.[13] Thus, for example, her accusation that Mr. McCarthy had tried to have her arrested for no reason (see CP 200-202, 208, 214, 227, 238-240.) should have been balanced by evidence that she had assaulted a pregnant stranger by ripping a necklace off the stranger's neck, and that Mr. McCarthy had actually talked officers out of making a custodial arrest. RP 753-754; see also Exhibit 116 (proposed but not admitted), Supp. CP.

By excluding relevant and admissible testimony, the trial court violated Mr. McCarthy's right to present a defense. U.S. Const. Amend. XIV; Holmes, supra. The jury was left with a one-sided, incomplete, and misleading picture of the relationship, and had no choice but to perceive Mr. McCarthy as the villain. The assault convictions must be reversed and the case remanded for a new trial, with instructions to permit evidence regarding Carey's violence and abuse. ER 401, ER 402, Holmes, supra.

15. The trial court erroneously excluded the expert testimony of Dr. Rybicki.

ER 702 governs testimony by experts, providing:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

[13] Ordinarily, res gestae evidence is only available to complete the story of the charged crime. State v. Brown, 132 Wash. 2d 529, 570-71, 940 P.2d 546, 569 (1997) (Brown I). Here, evidence of Carey's misconduct should have been admitted to complete the story of each prior alleged incident, so that the jury received a complete picture.

> experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. "Helpfulness" is to be construed broadly. Philippides v. Bernard, 151 Wash.2d 376, 393, 88 P.3d 939 (2004) (citing Miller v. Likins, 109 Wash.App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. Id, at 148.

Expert testimony on the subject of domestic violence is admissible on the issue of the victim's credibility. For example, expert testimony may be used to explain seemingly inconsistent statements and conduct or to address a delay in reporting. State v. Magers, 164 Wash. 2d 174, 184-86, 189 P.3d 126, 132 (2008); see also State v. Grant, 83 Wash.App. 98, 920 P.2d 609 (1996); State v. Ciskie, 110 Wash. 2d 263, 273-80, 751 P.2d 1165 (1988). Evidence of prior abuse may also be admissible to establish the reasonableness of the victim's fear, in cases where reasonable fear is an element of the offense. Magers, at 182-184.

Here, the defense repeatedly sought to offer the testimony of Dr. Rybicki. RP 23-29, 383-384, 544-552, 954, 1187. The purpose of the evidence was to rebut the state's express and implied efforts to bolster Carey's testimony (through explanations of her statements and behavior). See, e.g., RP 609 (social worker testified that, in her experience, it is not

unusual for domestic violence victims to maintain contact with their abusers).

The evidence was relevant for this purpose under ER 401's low threshold. See Magers, at 182-186. Dr. Rybicki's testimony would also have undermined the prosecutor's assertions regarding the reasonableness of her fear. Id. Given the Supreme Court's broad definition of "helpfulness," the evidence should have been admitted. Philippides, at 393.

Furthermore, the trial court applied the wrong legal standard in ruling to exclude the evidence. Instead of determining whether or not Dr. Rybicki's testimony would have been helpful to the jury, the trial court excluded the evidence because it did not establish a defense to the charge, and thus was more prejudicial than probative. RP 28-29. The trial judge also expressed his concern that Dr. Rybicki's testimony might constitute a comment on Carey's credibility. RP 1194-1195. This was error.

Where the prosecution introduces testimony about prior abuse between the defendant and another person, expert testimony is admissible to help the jury evaluate credibility. Grant, at 109. The prosecution raised the issue by introducing evidence about prior incidents that allegedly resulted in Carey's delayed reporting, inconsistent statements, and contradictory behavior. This opened the door to the expert testimony. Jones II, at 298;

Gefeller, at 455; Hartzell, at 926. Such testimony would have been helpful, and the evidence should have been admitted. ER 702; Phillipides.

By excluding relevant and admissible evidence, the trial court violated Mr. McCarthy's right to present a defense. U.S. Const. Amend. XIV; Holmes, supra. His convictions must be reversed and the case remanded for a new trial, with instructions to permit Dr. Rybicki to testify on Mr. McCarthy's behalf. ER 401, ER 402, ER 702; Philippides, supra.

III. MR. MCCARTHY WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

A. Standard of Review

A trial court's determination regarding the existence of a conflict of interest is reviewed de novo. State v. Orozco, 144 Wash. App. 17, 20, 186 P.3d 1078 (2008).

B. CrR 3.3 guaranteed Mr. McCarthy a speedy trial.

CrR 3.3 is captioned "Time for trial," and sets out the speedy trial rule for criminal cases in Washington. Under CrR 3.3(h), "[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1). A person who is in custody must be brought to trial within 60 days of the case's "commencement date," or within 30 days following the end of an "excluded period," whichever is

later. CrR 3.3(b). The initial commencement date is the date of arraignment. CrR 3.3(c)(1). The commencement date may be reset under certain circumstances, which include disqualification of counsel. CrR 3.3(c)(2).

In this case, Mr. McCarthy was arraigned on December 14, 2010, and he remained in custody. RP 1000; Clerk's Minutes 12/14/10, Supp. CP. After several continuances, trial was set to commence on August 23, 2011, with a speedy trial expiration date of September 22, 2011. RP (5/25/11) 8-9; Order Setting Trial Date (May 25, 2011) Supp. CP. Eleven days before the start of trial, the deputy prosecutor sought an order disqualifying the entire county prosecutor's office. RP (8/12/11). The order was granted, and Mr. McCarthy's speedy trial expiration date was reset to October 11, 2011, pursuant to CrR 3.3(c)(2)(vii). CP 1; RP (8/18/11) 30-31.

Because the case was delayed beyond the September 22 expiration date as a result of the disqualification order, the speedy trial issue turns on the propriety of that order.

C. The trial judge should not have ordered disqualification of the entire Kitsap County prosecutor's office eleven days before the scheduled start of trial.

An attorney may be disqualified as counsel when s/he is likely to be a necessary witness at trial. RPC 3.7. The issue arises when the attorney will provide material testimony unobtainable elsewhere. State v. Schmitt, 124

Wash. App. 662, 666-667, 102 P.3d 856 (2004). Similarly, an attorney may be disqualified from further representation by a conflict of interest relating to a current or former client or to the attorney's personal interests. See RPC 1.7-1.11. Where the disqualified attorney is a deputy prosecuting attorney, disqualification of the entire office is unnecessary (unless the deputy cannot be effectively screened from further involvement in the case).[14] Schmitt, at 668-669.

Here, there is no indication in the record—beyond conclusory assertions—that the deputies handling the case were likely to be necessary witnesses at trial. Neither deputy described any particular information they'd uncovered that made either of them a material witness, or that any of the information in their possession would be unobtainable from another source. Indeed, their vague statements suggest that whatever information they possessed had originated with the police and other witnesses who were available to both parties.[15] RP (8/12/11).

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[14] The same is not necessarily true where the disqualified attorney is the elected prosecutor. See State v. Stenger, 111 Wash.2d 516, 760 P.2d 357 (1988).

[15] The prosecutors' claimed conflict apparently arose out of fear that they might become impeachment witnesses if testimony differed from what they'd learned in their witness interviews. RP (8/12/11) 11-12, 15-16. This risk arises in every case where an attorney personally interviews a witness in preparation for trial. Under the prosecutors' theory, the office should be disqualified every time an attorney interviews a witness in the absence of a third party observer or a contemporaneous recording.

Nor does the record contain any indication of another conflict of interest that would interfere with either deputy's participation. RP (8/12/11). Indeed, the assistant attorney general who took over prosecution of the case remarked, "I still don't understand all the reasons for the conflict that Kitsap County perceives." RP (8/18/11) 42.

Furthermore, even if the information in the record were sufficient to support disqualification of the two deputies, the trial judge should not have disqualified the entire office. Neither deputy provided information suggesting that they could not effectively be screened from the case if they were personally disqualified from prosecuting. RP (8/12/11). Accordingly, the order disqualifying the entire office should not have been entered. Schmitt, at 668-669.

Because the order disqualifying the prosecutor's office was not supported by the record, Mr. McCarthy's commencement date should not have been reset, and the case should not have been delayed beyond the September 22 expiration date. The case must be dismissed. CrR 3.3(h).

D. If the county prosecutor truly did have a conflict of interest, then the speedy trial violation resulted from government mismanagement.

Government mismanagement cannot justify delaying a trial beyond the expiration of speedy trial. See, e.g., State v. Michielli, 132 Wash. 2d 229, 937 P.2d 587 (1997); see also State v. Brooks, 149 Wash. App. 373, 384,

203 P.3d 397 (2009). Where governmental mismanagement forces a continuance beyond speedy trial expiration, dismissal is appropriate. Id.

Here, the late discovery of the conflict of interest constituted mismanagement. Before Mr. McCarthy's arrest, the state had investigated the alleged assaults for at least three months following Carey's late-August interview with Detective Bockelie. RP 796; CP 57-70. When the deputy prosecutors announced that they'd developed a conflict after interviewing witnesses, they'd had an additional eight months to prepare for trial. RP (8/12/11). Mr. McCarthy had spent this time in solitary confinement (because of his status as a former police officer). RP (8/12/11) 14; RP 1000.

Had the prosecution diligently prepared for trial, the purported conflict would have been discovered earlier, substitute counsel would have appeared sooner, and the trial would have been held before the expiration of speedy trial. That sufficient preparation could be performed in a much shorter period is demonstrated by the success of AAG Hillman, who was ready to start trial only two months after appearing in the case. Notice of Appearance, Supp. CP.

In the alternative, the prosecutors could have avoided the conflict altogether by having a third party attend witness interviews or by making an audio or video recording of the interviews.

The prosecution's failure to avoid the conflict and/or to discover the conflict in a timely fashion constituted mismanagement that prejudiced Mr. McCarthy by delaying the trial until after expiration of speedy trial. Michielli, supra. Accordingly his convictions must be reversed and the case dismissed with prejudice. Id.

IV. THE TRIAL JUDGE ERRONEOUSLY ADMITTED EVIDENCE OF MR. MCCARTHY'S PRIOR MISCONDUCT IN VIOLATION OF ER 403 AND ER 404(B).

A. Standard of Review

The correct interpretation of an evidentiary rule is a question of law, reviewed de novo. State v. DeVincentis, 150 Wash. 2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. Id.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. Depaz, at 858. An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. State v. Everybodytalksabout, 145 Wash. 2d 456, 468-69, 39 P.3d 294 (2002).

B. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

Under ER 404(b), "[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.[16] Fisher, at 745.

A trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." DeVincentis, at 17-18. The state bears a "substantial burden" of showing admission is appropriate for a purpose other than propensity. DeVincentis, at 18-19. Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. Fisher, at 745. Evidence causes unfair prejudice when it is more likely to produce an emotional response than a rational decision. See City of Auburn v. Hedlund, 165 Wash. 2d 645, 654, 201 P.3d 315 (2009). Doubtful cases must be resolved in favor of exclusion. State v. Thang, 145 Wash. 2d 630, 642, 41 P.3d 1159 (2002).

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[16] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

C. The trial court applied the wrong legal standard in evaluating the danger of unfair prejudice.

Here, the court did not address prejudice or probative value in its oral ruling. RP (10/14/11) 37. The court's written findings (prepared by the prosecution and entered after the trial had concluded) include a passing and conclusory reference to probative value and prejudice, without elaboration. CP 243-249. Furthermore, although the court identified a purpose for admitting the evidence, it failed to find the evidence relevant to establishing an element of the offense, either in its oral ruling or its written findings. RP (10/14/11) 37; CP 243-249. The evidence should have been excluded. The evidence—that Mr. McCarthy had allegedly assaulted Carey on prior occasions, restrained her with handcuffs, locked her in a closet, had his law enforcement associates contact her in violation of a restraining order, threatened her with a propane torch, purposefully injured the dog Ginger, and delayed obtaining medication for the dog Emily—was unfairly prejudicial, and likely to be used as propensity evidence. CP 243-249. This is especially true of the allegations of prior assaults, given that Mr. McCarthy was on trial for assault.

In addition, the probative value was low in the context of this case. Carey's delayed report could be explained without reference to the specific prior allegations. Furthermore, the reasonableness of Carey's

fear—an element of Count II—was not contested by the defense, and few would dispute that one's fear was justified, if another did indeed hold a gun to the back of one's head.

Because of the extreme potential for prejudice inherent in Carey's allegations of assaultive behavior, there is a reasonable possibility that the error materially affected the outcome of the case. Everybodytalksabout, at 468-69. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

V. MR. MCCARTHY'S CONVICTIONS WERE BASED IN PART ON PROPENSITY EVIDENCE, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); State v. Kirwin, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. State v. Nguyen, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Toth, 152 Wash. App. 610, 614-15, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that untainted evidence is so overwhelming it requires a guilty finding. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. A conviction may not rest on propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment. [17] U.S. Const. Amend. XIV; Garceau v. Woodford, 275 F.3d 769, 775 (9th Cir. 2001), reversed on other grounds at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003); see also McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993). A conviction

[17] The U.S. Supreme Court has expressly reserved ruling on a very similar issue. Estelle v. McGuire, 502 U.S. 62, 75 n. 5, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

based in part on propensity evidence is not the result of a fair trial.

Garceau, at 776, 777-778.[18]

Propensity evidence is highly prejudicial, and there are numerous justifications for excluding it:

> For example, courts, reasoning that jurors may convict an accused because the accused is a "bad person," have typically excluded propensity evidence on grounds that such evidence jeopardizes the constitutionally mandated presumption of innocence until proven guilty. The jury, repulsed by evidence of prior "bad acts," may overlook weaknesses in the prosecution's case in order to punish the accused for the prior offense. Moreover, as scholars have suggested, jurors may not regret wrongfully convicting the accused if they believe the accused committed prior offenses. Courts have also barred admission of propensity evidence on grounds that jurors will credit propensity evidence with more weight than such evidence deserves. Researchers have shown that character traits are not sufficiently stable temporally to permit reliable inferences that one acted in conformity with a character trait. Furthermore, courts have excluded propensity evidence because such evidence blurs the issues in the case, redirecting the jury's attention away from the determination of guilt for the crime charged.

Natali & Stigall, *"Are You Going to Arraign His Whole Life?": How* Sexual Propensity Evidence Violates the Due Process Clause, 28 Loyola U. Chi. L.J. 1, at 11-12 (1996).

In the absence of a limiting instruction, the jury is likely to use the prior "bad acts" as propensity evidence; this is especially true when jurors

[18] see also Old Chief v. United States, 519 U.S. 172, 182, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) ("There is, accordingly, no question that propensity would be an 'improper basis' for conviction...") (citation omitted).

are required to consider "all of the evidence" relating to a proposition, "in order to decide whether [that] proposition has been proved..." CP 75-80.

C. Mr. McCarthy's convictions were based in part on propensity evidence.

Although the court admitted testimony regarding Mr. McCarthy's prior misconduct admissible to explain the delay in reporting and to prove the reasonableness of Carey's fear, the evidence was admitted without limitation, and the jury was not instructed to consider it solely for its intended purpose. See Court's Instructions, generally, CP 74-98. As a result, the jurors were permitted to consider the evidence for any purpose, including as substantive evidence of guilt. State v. Myers, 133 Wash.2d 26, 36, 941 P.2d 1102 (1997). Furthermore, in light of the court's instruction to "consider all of the evidence," it is highly likely that the jury erroneously used evidence of prior misconduct as propensity evidence. CP 75-80.

This error was manifest, because it had practical and identifiable consequences at trial. By permitting the jury to consider Mr. McCarthy's prior misconduct as substantive evidence of guilt, the court tipped the balance in favor of conviction and allowed a guilty finding based on propensity evidence. Accordingly, the error can be reviewed for the first time on appeal. RAP 2.5(a)(3); Nguyen, at 433.

Evidence of Mr. McCarthy's prior misconduct suggested that he had a propensity to commit assault. The court's instructions encouraged jurors to convict based (in part) on propensity evidence, in violation of Mr. McCarthy's Fourteenth Amendment right to due process. Garceau, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

VI. THE ERRONEOUS ADMISSION OF HEARSAY REQUIRES REVERSAL OF MR. MCCARTHY'S ASSAULT CONVICTIONS.

A. Standard of Review

The interpretation of an evidence rule is a question of law, reviewed de novo. DeVincentis, at 17. Where no constitutional rights are infringed, evidentiary rulings are reviewed for abuse of discretion. Fisher, at 750. An erroneous evidentiary ruling requires reversal if it is prejudicial. State v. Asaeli, 150 Wash.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. Id., at 579.

B. The trial judge erroneously admitted hearsay that did not fit within an exception to the rule against hearsay.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay evidence is generally

inadmissible. ER 802. The proponent of a statement's admissibility bears the burden of establishing an exception to the rule against hearsay. State v. Nieto, 119 Wash. App. 157, 161, 79 P.3d 473 (2003).

A declarant's out-of-court statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1).

To establish the foundation for admission of a prior consistent statement, "the proponent of the testimony must show that the witness's prior consistent statement was made before the witness's motive to fabricate arose in order to show the testimony's veracity and for ER 801(d)(1)(ii) to apply." State v. Thomas, 150 Wash.2d 821, 865, 83 P.3d 970 (2004); see also State v. Brown, 127 Wash.2d 749, 758 n.2, 903 P.2d 459 (1995) (Brown II). This is because "[m]ere repetition of a statement made when the motive to fabricate was the same does nothing to establish veracity." Brown II, at 758 n.2.

In addition, "a charge of recent fabrication can be rebutted by the use of prior consistent statements only if those statements were made under circumstances indicating that the witness was unlikely to have foreseen the

legal consequences of his or her statements." State v. Makela, 66 Wash.App. 164, 168-169, 831 P.2d 1109 (1992).

In this case, the trial court erroneously overruled Mr. McCarthy's hearsay objections, admitting several out-of-court statements as prior consistent statements. See RP 419-467, 517, 536, 897. These statements were hearsay, and did not fit within ER 801(d)(1). The prosecution, as the proponent of the evidence, was tasked with identifying the point at which a motive to fabricate arose, and with establishing that the statements were made before that point. Thomas, 865. It failed to do either of these things.

Further, the state was required to prove circumstances indicating that Carey was unlikely to have foreseen the legal consequences of her statements. Makela, at 168-169. It failed to meet this burden as well; instead, the record makes clear that Carey was well aware that accusing McCarthy was likely to result in prosecution. RP 184-360, 368-468.

C. The erroneous admission of hearsay testimony prejudiced Mr. McCarthy and affected the outcome of the trial.

The outcome of trial turned on Carey's credibility. By introducing testimony that she had repeated her accusation to others, the prosecution was able to improperly bolster her credibility through "mere repetition." Brown II, at 758 n.2. Because Carey's credibility was the focus of trial,

the error prejudiced Mr. McCarthy, and materially affected the outcome.[19] Asaeli, at 579. The assault convictions must be reversed, and the case remanded for a new trial. Id.

VII. MR. MCCARTHY WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. In re Fleming, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and

[19] This is especially true because the error was compounded by defense counsel's failure to object to additional bolstering testimony, or to request a limiting instruction.

defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." United States v. Salemo, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The strong presumption of adequate performance is only overcome when "there is no conceivable legitimate tactic explaining counsel's performance." Reichenbach, at 130. Any trial strategy "must be based on reasoned decision-making..." In re Hubert, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., State v. Hendrickson, 129 Wash.2d 61, 78-

79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel provided ineffective assistance by failing to object to inadmissible and prejudicial hearsay that bolstered Carey's testimony.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. State v. Saunders, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

Here, defense counsel failed to object on numerous occasions when Carey's out-of-court accusations were introduced through inadmissible hearsay. These occurred during the testimony of advocate Brockman (RP 433-434; 436-437, 439), Dr. Hendrix (RP 563), nurse Luber (RP 593), social worker Blythe (RP 604-610), friend Day (RP 638-639), friend Bauer (RP 667-668), and Deputy Schaefer (RP 721). As a result of counsel's failure to object, the prosecution was permitted to significantly bolster Carey's testimony through repetition, which the Supreme Court has noted is not a proper test of veracity. Brown II, at 785 n. 2.

The failure to object constituted ineffective assistance. Saunders, at 578. First, there was no strategic reason to allow the prosecution to bolster Carey's testimony. In fact, the defense strategy involved discrediting Carey's story. The numerous consistent repetitions strengthened the state's evidence in the eyes of jurors. Second, an objection would likely have been sustained, as the testimony consisted of inadmissible hearsay that did not fit within an exception to the rule against hearsay.[20] Third, the result of the trial would likely have been different, had counsel objected. The outcome of this case turned on Carey's credibility: there were no independent eyewitnesses to the incident, and the forensic evidence and expert testimony were ambiguous. By allowing the state to improperly bolster Carey's testimony through repetition, counsel increased the chances of conviction.

Defense counsel's performance fell below an objective standard of reasonableness, and prejudiced Mr. McCarthy. Accordingly, the assault convictions must be reversed and the charges remanded for a new trial. Reichenbach, at 130.

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[20] The prosecutor overcame counsel's objection on three occasions by claiming similar testimony admissible as prior consistent statements under ER 801(d)(1). However, as noted elsewhere in this brief, the prosecution failed to establish a proper foundation for admission under that rule.

D. Defense counsel provided ineffective assistance by failing to request a limiting instruction.

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the case. See, e.g., State v. Tilton, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); State v. Jury, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. State v. Woods, 138 Wash. App. 191, 156 P.3d 309 (2007); see also State v. Rodriguez, 121 Wash. App. 180, 87 P.3d 1201 (2004).

Prior consistent statements are not admissible for their truth, but only for the limited purpose of rebutting an accusation of recent fabrication. Makela, at 168-169. Where a prior consistent statement is admitted under ER 801(d)(1), a limiting instruction is appropriate, if requested. State v. Redmond, 150 Wash.2d 489, 496, 78 P.3d 1001 (2003).

When the court overruled defense counsel's three objections to hearsay admitted as prior consistent statements, counsel should have requested instructions limiting the jury's evidence to its proper purpose. Makela, at 168-169. The same is true for the prior statements admitted without objection. Id. Because the evidence was admitted without limitation, it not only bolstered Carey's credibility but also became

available for use as substantive evidence of Mr. McCarthy's guilt. Myers, at 36.

The failure to request appropriate limiting instructions prejudiced Mr. McCarthy. Carey's testimony was the only direct evidence of both assault charges. By allowing prosecution witnesses to bolster Carey's testimony through "mere repetition," defense counsel strengthened her story and significantly undermined the defense case. Brown II, at 758 n. 2. Mr. McCarthy was deprived of the effective assistance of counsel. Saunders, supra. Accordingly, his assault convictions must be reversed and the case remanded to the trial court for a new trial. Id.

VIII. MR. MCCARTHY WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702. A trial court's decision denying a mistrial is reviewed for an abuse of discretion, unless the decision violates a constitutional right. State v. Babcock, 145 Wash. App. 157, 163-65, 185 P.3d 1213 (2008); Iniguez, at 280-81.

B. The trial judge should have granted Mr. McCarthy's motion for a mistrial.

A trial court should grant a mistrial when an irregularity in the trial proceedings is so prejudicial that it deprives the defendant of a fair trial.

Babcock, at 163. Among the factors to be considered are "(1) the seriousness of the irregularity, (2) whether challenged evidence was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow." Id.

The erroneous admission of evidence of prior misconduct is "'extremely serious.'" Id, at 164 (quoting State v. Escalona, 49 Wash.App. 251, 255, 742 P.2d 190 (1987)). Where the verdict depends on the jury's credibility determinations, there exists a "high potential for prejudice, [which] represents a serious irregularity." Id.

Here, the trial court carefully limited the state's ER 404(b) evidence to a few specific instances. RP 34-37. When Carey suggested that Mr. McCarthy had poisoned her and referenced "other things that I'm not allowed to talk about," she undermined the court's ruling and hinted at a laundry list of abuses that had been kept from the jury. RP 248. This "evidence" was not cumulative, because it suggested that Mr. McCarthy had perpetrated other acts of domestic violence in addition to those introduced at trial.

Furthermore, although defense counsel asked that Carey's remark be stricken, the court was unable to provide an effective curative instruction (beyond announcing that the remark was stricken), because the witness

interrupted the court by saying "I'm trying not to –," and was shushed by the prosecuting attorney. RP 248. In addition, although jurors are presumed to follow a court's instructions, "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Id, at 164 (quoting Escalona, at 255) (alteration in original) (internal quotation marks and citations omitted). This is so because "the admission of evidence concerning a crime similar to the charged offenses is inherently difficult to disregard." Id, at 164-165.

Indeed, when moving for a mistrial, counsel remarked that the court could not "unring the bell," and declined to request further instruction. RP 261, 265. As counsel put it:

> The bell has been rung. The jury knows this. No limiting instruction in the world or no motion to strike the information is going to take that away. So the jury is left in the quandary of, gosh, I wonder what else, what other horrible things Mr. McCarthy did to Ms. Carey that we don't get to know about. That question will never get answered in the current posture of this trial and can't be answered.
> RP 262.

Even the trial court implied that further instruction about the statement would likely "cause[ ] more harm than benefit." RP 264.

Carey's suggestion that she'd been poisoned and her remark about "other things" she was "not allowed to talk about" prejudiced Mr.

McCarthy and infringed his due process right to a fair trial. Babcock, at 163. The trial judge should have granted his motion for a mistrial. Id. Accordingly, his assault convictions must be reversed and the case remanded for a new trial. Id.

IX. THE TRIAL COURT ABUSED ITS DISCRETION BY SCORING COUNTS I AND II SEPARATELY INSTEAD OF FINDING THAT THEY COMPRISED THE SAME CRIMINAL CONDUCT.

A. Standard of Review

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the law. State v. Haddock, 141 Wash.2d 103, 110, 3 P.3d 733 (2000).

B. Multiple offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, with the same overall criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

> [W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more

> crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. State v. Dolen, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), review denied at 131 Wash.2d 1006, 932 P.2d 644 (1997) (citing RCW 9.94A.110); State v. Jones, 110 Wash.2d 74, 750 P.2d 620 (1988) (Jones III); State v. Gurrola, 69 Wash.App. 152, 848 P.2d 199, review denied, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court "'should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next....'" State v. Garza-Villarreal, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting State v. Dunaway, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. State v. Williams, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); State v. Porter, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

C. The sentencing court should have scored Counts I and II as one offense under the "same criminal conduct" test.

Counts I and II stemmed from a single incident: Mr. McCarthy was convicted of twice assaulting Carey during a single incident, at the same

time and place, with the same overall criminal objective, first by pressing a firearm to the back of her head, and second by pushing her out the window. The prosecution did not establish that his overall criminal objective changed between the assault with the firearm and the push out the window. Accordingly, the evidence was insufficient to establish that the two offenses scored separately under RCW 9.94A.589. The court should have found Counts I and II to be the same criminal conduct and scored them as a single offense. RCW 9.94A.589(1)(a); Garza-Villarreal. Had the court done so, it would not have sentenced Mr. McCarthy with an offender score of two.

Mr. McCarthy should have been sentenced with an offender score of zero instead of two. Accordingly, his sentence must be vacated and the case remanded for resentencing with an offender score of zero. Id.

X. MR. MCCARTHY'S SENTENCE WAS IMPOSED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY FIND AGGRAVATING FACTS BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702.

B. The trial court violated Mr. McCarthy's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22 by imposing an aggravated sentence based on judicial factfinding by a preponderance of the evidence.

The Sixth Amendment guarantees an accused person the right to a trial by jury. U.S. Const. Amend. VI. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. State v. Recuenco, 163 Wash.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).

Where an offender is convicted of multiple offenses, the prosecution may seek to establish that the current offenses comprise separate criminal conduct. Dolen, at 365. If the prosecution proves that multiple current offenses occurred at different times, different places, against different victims, or with different criminal objectives, then the court imposes a higher sentence than would otherwise be available. RCW 9.94A.589(1)(a). Under current procedure, this determination is made by a court by a preponderance of the evidence. RCW 9.94A.589(1)(a).

Here, the trial judge ruled that Mr. McCarthy's two assaults were not the same criminal conduct. RP (11/10/11) 7. The court apparently found by a preponderance of the evidence that Mr. McCarthy's overall criminal

objective changed when he (allegedly) pushed Carey from the window. This factual finding allowed the court to add two points to Mr. McCarthy's offender score, thereby increasing the standard range for each offense. RP (11/10/11) 7, 39.

The jury's guilty verdicts did not authorize this higher sentence. Instead, the increase in offender score and standard range stemmed from judicial factfinding, under a preponderance standard. This was error. Blakely, supra.

Absent a waiver or a stipulation, the trial court was not permitted to make this factual finding. State v. Flores, 164 Wash.2d 1, 20, 186 P.3d 1038 (2008); see also State v. Van Buren, 136 Wash. App. 577, 580, 150 P.3d 597 (2007). Mr. McCarthy contested the issue, and did not waive his right to a jury trial. RP (11/10/11) 5.

Under Blakely and its progeny, the jury's verdict authorized the judge to sentence Mr. McCarthy with an offender score of zero. In the absence of a jury determination that Mr. McCarthy's two offenses comprised separate criminal conduct, the trial court was not authorized to sentence him with an offender score of two. The sentence violated Mr. McCarthy's right to a jury trial and to proof beyond a reasonable doubt, under both the state and federal constitutions. Flores, supra. The sentence must be

vacated, and the case remanded to the trial court for resentencing with an offender score of zero. Id.

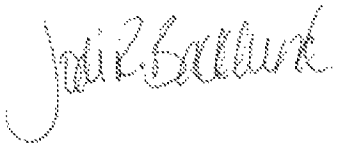
CONCLUSION

For the foregoing reasons, the assault convictions must be reversed and the case dismissed with prejudice. In the alternative, the charges must be remanded for a new trial.

If the convictions are not reversed, the sentence must be vacated and the case remanded for resentencing with an offender score of zero.

Respectfully submitted on August 9, 2012,

BACKLUND AND MISTRY



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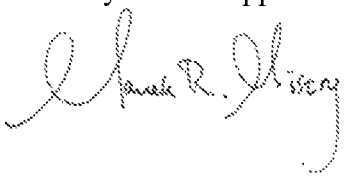

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, Corrected Copy, postage prepaid, to:

Dennis McCarthy, DOC #353882
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

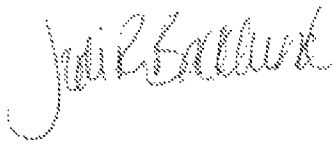
And to:

Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

I filed the Appellant's Opening Brief, Corrected Copy, electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 9, 2012.



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Comments:

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